

**JAMCO CONSTRUCTORS,
INC.**

**CONTRACT NO. V501C339
3516TR**

VABCA3271R &

**VA MEDICAL CENTER
ALBUQUERQUE, NEW MEXICO**

Raymond R. Flowers, Esq., Fairfield, Farrow, Hunt, Reecer & Strotz, Albuquerque, New Mexico, for the Appellant.

Charlma O. Jones, Esq., Trial Attorney; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

The Government has filed a timely MOTION FOR RECONSIDERATION of the Board's decision converting the default termination to a termination for convenience. The decision is reported at 94-1 BCA ¶ 26,405 and familiarity with the Board's findings is presumed. Appellant has filed a brief in opposition to the Government's motion.

The Government asserts in its motion that the decision is "contrary to existing case law . . . sets a standard that is extremely difficult to meet and simply substitutes the Board's 'after the fact' discretion for that of the Contracting Officer." Before addressing the misconceptions about the legal standard set forth in our opinion, we observe that most of the Government's motion is devoted to rearguing the facts and attempting to persuade the Board to give greater or lesser weight to various portions of the evidentiary record than it did in its decision. We thoroughly considered the evidentiary record and the Government's brief in the first instance and find its arguments no more persuasive the second time around. As we observed with respect to a reconsideration motion in *Preston-Brady Co., Inc.*, VABCA No. 1849R, 88-1 BCA ¶ 20,260 at 102,543:

[I]t has not convinced us that material errors were made which would require reconsideration of our "bottom line" determinations previously made. Where the losing party simply disagrees with our findings of fact and the weight given the evidence and testimony properly before the Board, that disagreement alone does not constitute an adequate basis for our reconsideration.

Turning to the Government's assertion that the Board's decision in this appeal was "contrary to the intent of *Darwin*" and at "odds with other decisions of the courts and boards of contract appeals" it is difficult to ascertain the exact nature of its disagreement with the legal principles utilized in our opinion. The Government concedes that *Darwin* stands for the principle that the authority to terminate a contract is discretionary and that the "exercise of that discretion must be fair and reasonable." *Darwin Construction*

Company, Inc. v. United States, 811 F.2d 593 (Fed. Cir. 1987)

In our opinion we stated that the exercise of discretion by a Contracting Officer:

presupposes an active and reasoned consideration of available and sometimes contradictory information. Various factors must be evaluated and the totality of circumstances weighed by the Contracting Officer in arriving at a decision which has the most serious consequences for a contractor. (citation omitted)

The Government "agrees that the totality of circumstances is the proper standard" although it is silent as to whether it believes any degree of rationality should be exercised in the weighing process. However, a close reading of the motion fails to find any serious challenge to this rather unexceptional proposition. Rather, the Government argues that the Contracting Officer did thoroughly examine the "totality of circumstances" and that the Board has overturned the default simply because the Contracting Officer "did not make the same analysis *or as in depth an analysis* as the Board believes it should have made." (emphasis added)

By definition, the Board's role is retrospective in nature which subjects it to the universally popular criticism of "20/20 hindsight." But the Government misreads our opinion if it believes we are questioning whether or not a default termination would have been appropriate rather than the decision making process itself. Our overturning of the default termination resulted from the failure of the Contracting Officer to question contradictory data and his failure to consider information which by his own admission was of critical importance in deciding whether or not to terminate. Among the factors which the Government's own regulations require a Contracting Officer to consider is the:

urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(FAR 49.402-3 (f) (4))

The record disclosed that the time to complete the Contract was of great importance to the Contracting Officer, "because of the seriousness and the demand for the surgical suites." Central to any consideration of this question is how long it would take either the current or a replacement contractor to complete the job. Yet, as we noted in our opinion, no inquiry was made by the Contracting Officer as to why the COTR was giving him wildly disparate estimates of the time for the Appellant to complete the project, and there was no attempt made to reconcile conflicting information about the Contractor's job progress to date.

Nor was there *any* inquiry at all by the Contracting Officer as to how long it would take a replacement contractor to complete the project. The Contracting Officer simply assumed, without any factual predicate or analysis, that a "take-over would be a *very short period* of time" and that a replacement contractor would "finish in a *very timely manner*." (emphasis added in original opinion) The COTR's estimate of the time it would

take a replacement contractor to complete, which if known by the Contracting Officer would have altered his view about his "course of action", was neither solicited nor volunteered. The failure to consider this critical information does not, in our judgment, constitute a reasoned consideration of relevant factors nor a weighing of the circumstances. "The Government owes the contractor no less than an assessment of all the *relevant* circumstances when it exercises its discretion under the *Default* clause." ***Walsky Construction Company***, ASBCA No. 41541, 1994 WL 43415 (February 9, 1994) (emphasis added). Such a requirement, contrary to Government assertion, does not "set a standard that is extremely difficult to meet."

Accordingly, we cannot now, as we could not in our earlier opinion, find that the Contracting Officer was exercising reasonable discretion *at the time* he decided to terminate the Contractor for default. Lest there be further confusion by the Government, we hasten to add that the fact that a replacement contractor would take as long or longer to complete a contract does *not* mean that the Government is precluded from terminating a contractor in default if, after consideration of the relevant information, it finds it in its best interest to do so. Nor do we hold that the failure of a Contracting Officer to consider *all* of the factors listed in the FAR is an automatic ticket to a convenience termination by a defaulted contractor, if the important factors have been considered in the "totality of the circumstances." See ***Danrenke Corporation***, VABCA No. 3601, 93-1 BCA ¶ 25,365; ***Lafayette Coal Company***, ASBCA No. 32174, 89-3 BCA ¶ 21,963 at 110,482.

Finally, we wish to correct an impression which we may have unintentionally conveyed in our original opinion. Whether a Contracting Officer has exercised reasonable discretion in reaching a decision is to be determined by a examination of what was done or not done in a particular case and is not affected by the amount of experience that either the Contracting Officer or the COTR may have had in the administration of government contracts. It is obvious that this Board was not impressed by the testimony or actions of the VA personnel who were involved in this contract and that we attributed this largely to their relative inexperience in contract administration. But our decision was predicated on the Government's failure to consider various matters rather than on the suspected causes of this failure.

DECISION

The Government has failed to persuade us that our findings or conclusions regarding the termination were unsupported by the record or were erroneous. Accordingly, the Government's MOTION FOR RECONSIDERATION in VABCA-3271 and VABCA-3516T, is denied.

DATE: **February 25, 1994**

GUY H. McMICHAEL III
Chief Administrative Judge
Panel Chairman

We concur:

MORRIS PULLARA, JR.
Administrative Judge

JAMES K. ROBINSON
Administrative Judge